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No. 84-1361

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH MOSES LOUD HAWK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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Respondents devote the bulk of their lengthy opposition to arguments on the merits without providing any convincing reason why certiorari should not be granted in this case. The truth of the matter is that the proper treatment under the Sixth Amendment of time on appeal is an important, recurring question not foreclosed by the Speedy Trial Act, on which the courts of appeals are divided. Review by this Court is plainly warranted.

1. Respondents' argument (Br. in Opp. 18-20) that this case is moot because the court of appeals' mandate issued[1] is wholly lacking in substance. It is settled law that the

[1]The government filed a motion to stay the mandate pending resolution of its petition for certiorari, but the mandate had already issued (Br. in Opp. App. 17a, 18a). A motion to recall the mandate was denied (*id.* at 9a, 19a).

issuance of a court of appeals' mandate has no effect on the power of this Court to review its judgment. See, *e.g., Aetna Casualty Co.* v. *Flowers,* 330 U.S. 464, 467 (1947). In *Carr* v. *Zaja,* 283 U.S. 52, 53 (1931), the respondent advanced the same argument on which respondents here rely: "the mandate of the Circuit Court of Appeals was not stayed, but was issued to the District Court * * * [and] therefore the case is finished." This Court rejected that contention, holding (*ibid.*) that issuance of the mandate "does not defeat [its] jurisdiction."

The reason for this rule is plain. A reversal of the judgment of a lower court by this Court serves to vacate that judgment and to nullify all that was done under the mandate embodying the erroneous judgment.[2] See *United States* v. *Villamonte-Marquez,* 462 U.S. 579, 581-582 n.2 (1983); *United States* v. *Morrison,* 429 U.S. 1, 3 (1976) (per curiam); *Mancusi* v. *Stubbs,* 408 U.S. 204, 206-207 (1972); *Bakery Sales Drivers Local Union No. 33* v. *Wagshal,* 333 U.S. 437, 442 (1948); *Dakota County* v. *Glidden,* 113 U.S. 222, 224 (1885). Accordingly, should this Court ultimately reverse the judgment of the court of appeals, which had affirmed the district court's dismissal of the indictment, the indictment would automatically be reinstated, and the prosecution could continue. The parties therefore retain " 'a legally cognizable interest in the outcome' " of the case. *Murphy* v. *Hunt,* 455 U.S. 478, 481 (1982) (citations omitted).

Respondents evidently would carve an exception to this rule — judgments reversed can be reinstated, money paid can be recovered, but indictments, once dismissed, are forever incapable of being revived. Such an exception

[2]Moreover, if issuance of the mandate mooted a case, the courts of appeals could in many cases insulate their judgments from review by this Court merely by denying motions to stay or recall their mandates.

finds no basis in logic[3] and would further no policy,[4] but rather would serve only to create a wasteful stay practice in the courts of appeals and in this Court, devoid of practical utility. *Villamonte-Marquez* surely does not support respondents' position.[5] There, the government had obtained a voluntary dismissal of the indictment following issuance of the court of appeals' mandate. The Court's observation (462 U.S. at 581-582 n.2) that the indictment had merged with the convictions was directed to the contention that the government's *voluntary* dismissal, which according to the dissent was not required by the court of appeals' mandate (*id.* at 596 (Brennan, J., dissenting)), had mooted the case. Neither the Court (*id.* at 581 n.2) nor the dissenting Justices (*id.* at 595 (Brennan, J., dissenting)) disputed the fundamental principle that compliance with the mandate pending

[3]There is nothing peculiar to indictments that does not allow them to be revived following issuance of the court of appeals' mandate. Even if there were, this Court could order the court of appeals to recall its mandate, thereby meeting all of respondents' objections. Respondents' contention (Br. in Opp. 18) that, because the indictment was dismissed with prejudice, "no new indictment can be issued" wholly misses the point that reversal by this Court would not require a new indictment but would simply reinstate the old one. We further note that, if respondents were correct on this point, it would seem to follow that government appeals from district court orders dismissing indictments would equally be "moot" unless the judgment of dismissal were stayed pending appeal. This would totally undermine existing practice in such cases, since stays have never been thought necessary to preserve the government's appeal rights.

[4]Obviously no double jeopardy concerns are present in this case, where the indictment was dismissed prior to trial.

[5]Nor does *United States* v. *Cook,* 705 F.2d 350 (9th Cir. 1983) (erroneously cited as *Calmitsch* v. *Ricsley* (Br. in Opp. 20)), support their argument. That case merely holds that, for purposes of the timeliness of a new trial motion under Fed. R. Crim. P. 33, the date of the "final judgment" is that on which the court of appeals' mandate issued, not when certiorari was denied. Nothing in the case suggests that this Court is powerless to reverse a court of appeals' judgment simply because its mandate has issued.

review by this Court does not deprive the Court of jurisdiction. Here, of course, the government has not taken a single step following issuance of the mandate to indicate in any way that it is abandoning the prosecution. Indeed, the judgment and mandate of the court of appeals required no action that might be subject to a stay. Nothing at all has happened following issuance of the mandate: the district court had dismissed the indictment, and the court of appeals' affirmance and subsequent mandate have resulted in absolutely no change in the practical positions of the parties. The case is not moot.

2. Respondents next assert (Br. in Opp. 21-24) that the question of the proper treatment of appeal time under the Speedy Trial Clause is not worthy of this Court's consideration. Pointing to the small percentage of federal speedy trial claims that arise under the Sixth Amendment as compared to those under the Speedy Trial Act (18 U.S.C. 3161 *et seq.*), respondents contend that the issues presented are not of continuing importance in the wake of the Act. As we discussed in our petition (at 13 n.10), however, it is precisely because the questions presented are not governed by the Act that they have continuing significance under the Sixth Amendment. And as evidenced by the large number of cases cited in our petition (at 20-24), the issue is a frequently recurring one. That cases raising the issue are only a small percentage of some larger subset of criminal cases is immaterial.

Moreover, the court of appeals' decision in this case, if allowed to stand, can be expected to spawn a number of similar claims in the future, threatening to nullify the government's right to appeal when significant delay may thereby be engendered. It is of course not uncommon for considerable delay to pass in the course of many appeals. This is especially true where the issues are important or difficult, as they often are in cases where the Solicitor

General has authorized an appeal. See, *e.g., United States* v. *Accardo,* 749 F.2d 1477 (11th Cir. 1985), reh'g pending, No. 82-5380 (three years); *United States* v. *Morgan,* 743 F.2d 1158 (6th Cir. 1984), petition for cert. pending, No. 84-1357 (two years); *United States* v. *Thompson,* 710 F.2d 1500 (11th Cir. 1983), cert. denied, 464 U.S. 1050 (1984) (three years); *United States* v. *Computer Sciences Corp.,* 689 F.2d 1181 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983) (two years); *United States* v. *DiBernardo,* 552 F. Supp. 1315 (S.D. Fla. 1982), appeal pending, No. 83-5295 (11th Cir.) (two years). The rule adopted by the court of appeals here could effectively deny the government the opportunity to seek review in this Court of orders affirming the dismissal of indictments or the suppression of evidence because of the length of time necessarily associated with this Court's review.

3. Respondents' attempt (Br. in Opp. 41-42) to distinguish the conflicting decisions of the Fifth, Seventh, and District of Columbia Circuits (see Pet. 20-21) is wholly unpersuasive. In *United States* v. *Jackson,* 508 F.2d 1001 (7th Cir. 1975), the court flatly held (*id.* at 1004) that the time spent on government appeals "should not be considered" in determining the length of delay for purposes of *Barker* v. *Wingo,* 407 U.S. 514 (1972). Nothing in the *Jackson* opinion supports respondents' contention (Br. in Opp. 41) that the court's statement is limited to prospective delay.[6] In *United States* v. *Bishton,* 463 F.2d 887 (D.C. Cir. 1972), the court reasoned (463 F.2d at 890) that only an improper appeal (*e.g.,* one taken by the government in bad

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[6]Indeed, respondents' concession (Br. in Opp. 41) that taking future delay into account would be "improper" because it "would in fact deny the Government its right to appeal" applies equally to delay that has already occurred on appeal. Respondents suggest no basis for disregarding one but not the other.

faith) could give rise to constitutional speedy trial concerns. Respondents distinguish this holding (Br. in Opp. 42) by the non sequitur that the *Bishton* court's rule allowing time on *improper* appeals to count for Sixth Amendment purposes "compels the conclusion that *all* appellate delay must be counted" (emphasis added). The court in *Bishton* certainly did not accept such curious reasoning, and respondents offer nothing to support it. Respondents similarly offer nothing to distinguish *United States* v. *Herman*, 576 F.2d 1139 (5th Cir. 1978), which followed the reasoning of *Jackson* and *Bishton* in refusing to find a Sixth Amendment violation resulting from government appeal time.[7]

4. Finally, respondents urge (Br. in Opp. 56) that the record in this case is too "muddied" to make it suitable for this Court's review. This contention utterly lacks merit. This case starkly presents the questions of the proper treatment under the Speedy Trial Clause of time on both government and defense appeals. The number of decisions, the presence of an en banc decision and an unreported superseded panel decision (both on an issue unrelated to the petition), and the "political overtones" that respondents have attempted to inject into what should have been a straightforward prosecution for possession of firearms and explosives, are of course completely irrelevant to whether

[7]Respondents may be attempting (Br. in Opp. 42) to distinguish *Herman* on the ground that the court of appeals there appeared to count appeal time as part of the length of delay, and simply found the delay justified (see 576 F.2d at 1145-1146). As we indicated in our petition (at 13 n.11), this rule, if properly applied, may achieve the same result as not including the time within the length of delay in the first instance. In any event, the rule expressed in *Herman* clearly is at odds with that applied by the court of appeals in this case, which refused to excuse the time attributable to the government's appeals.

this Court should grant review.[8] There is nothing in the record of this case to interfere with the Court's direct consideration of the appropriate legal rules governing whether time on pretrial government and defense appeals may give rise to a violation of the Sixth Amendment.[9]

For the foregoing reasons and those set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX. E. LEE
Solicitor General

APRIL 1985

[8]Respondents' assertion (*e.g.*, Br. in Opp. 56) of "Governmental misconduct" is without merit. Although the court of appeals concluded that the government could have gone forward with trial of the firearms counts in 1976, it nowhere questioned the government's good faith in refusing to do so (see Pet. 19 n.16). In any event, whether the government should in 1976 have gone forward on certain counts though not on others is irrelevant to the legal issues presented by our petition.

[9]The district court's alternative ground for decision under the Due Process Clause (see Br. in Opp. 56), which was not reached by the court of appeals, obviously will not prevent this Court from reviewing the court of appeals' ruling under the Speedy Trial Clause. As we noted in our petition (at 27-28 n.21), the district court's ruling in this regard is plainly wrong. We would have included the issue in the petition had the court of appeals reached it as an alternative ground for its affirmance of the district court.

DOJ-1985-04